IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

NO. 44567-1-II

PUGET SOUND HARVESTERS ASSOCIATION,

Appellant,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Respondent,

and,

PURSE SEINE VESSEL OWNERS ASS'N,

Respondent-Intervenor.

BRIEF OF APPELLANT

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I. INTRODUCTION

The starting and ending point for this Court's review are two basic questions: first, do the Washington Department of Fish and Wildlife's 2012 Puget Sound Commercial Salmon Regulations ("2012 Regulations") allocate the resource, Puget Sound chum salmon, equitably between the two competing commercial fishing groups in the South Puget Sound? And second, if not, is there a fair and rational basis, based on the attending facts or circumstances, for the disparate treatment?

The answer to both of these questions is "no." The resource is not allocated equitably. Since the regulations were last invalidated in 2008, Washington Department of Fish and Wildlife ("WDFW") has steadfastly maintained a consistent benchmark allocation providing an opportunity for the gillnet fleet to harvest less than 26 percent of the harvestable chum salmon in the South Puget Sound Areas 10/11 while providing an opportunity for the purse seine fleet to harvest 74 percent of the available resource. AR 3671-72 ("Concise Explanatory Statement"). The 2012 Regulations maintain this benchmark. Indeed, for 2012, the gillnet industry requested a relatively minor increase in their schedule – extending their "half-night marketing" nights into full night, and providing a minor number of additional "first starts." AR 3675. This request was

rejected, leaving the expected harvest level under the 2012 Regulations similar to the benchmark established between 2008 and 2011. It cannot be disputed that the 2012 Regulations do not provide for an equitable allocation of fish.

Nor has WDFW provided a rational basis, either in its "Concise Explanatory Statement" ("CES") or in the administrative record, for its continued insistence on setting a benchmark allocation for the gillnet fleet at 24 percent or for denying the gillnetters a slight increase in harvest. Indeed, WDFW has turned the resource allocation process on its head. Instead of starting with an assumption of equity and then explaining any departure, the 2012 CES fails to either justify why a departure from equitable allocation is necessary or why a benchmark of 24 percent is appropriate. Instead, the 2012 CES focuses only on explaining why the gillnet fleet's allocation was not increased above the benchmark 24 percent. WDFW has continuously failed since 2007 to provide a rational basis for its disparate treatment of the gillnet fleet.

Petitioner Puget Sound Harvester's Association ("PSHA") maintains that the 2012 Regulations are once again arbitrary and capricious on their face for failing to either equitably allocate the resource or explain the rational basis for doing otherwise.

II. ASSIGNMENT OF ERROR

Did the Superior Court err in its February 22, 2013, Order denying the Puget Sound Harvesters Association's challenge to the 2012 Non-Tribal Commercial Salmon Regulations for the South Puget Sound? While the Superior Court was not charged with entering findings of fact or conclusions of law, and this Court's review of the regulation is de novo, appellant points specifically to the Superior Court's errors in Finding of Fact No. 8 and Conclusions of Law 2-4.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. WDFW's 2012 Regulations for non-tribal commercial chum salmon fishing in the South Puget Sound continued a pattern of allocating only 24 percent of the available harvest to the commercial gillnet fleet and allocating the remaining 76 percent to the competing commercial purse seine fleet. Were WDFW's decisions both maintaining the disparate treatment and refusing a request by the gillnet fleet to slightly increase their allocation willful, unreasonable, and taken without regard to the attending facts and circumstances?

2. Do WDFW's 2012 Regulations for non-tribal commercial chum salmon fishing in South Puget Sound violate the gillnetter's right to equal protection under Article 1, § 1 of the Washington Constitution and

the Fourteenth Amendment of the U.S. Constitution where the regulations arbitrarily discriminate among fishermen of the same class?

IV. STATEMENT OF THE CASE

A. Pre-2012 History

The Washington Department of Fish and Wildlife ("WDFW") regulates commercial salmon fishing in Puget Sound by gear type and geographic areas. WDFW divides the Puget Sound into several areas. The case concerns Areas 10 and 11 in South Puget Sound. There are two major commercial gear types used in South Puget Sound – gillnets and purse seines. The target fishery in Areas 10 and 11 are "chum" or "keta" salmon. *See Puget Sound Harvester's Ass'n. v. Washington Department of Fish and Wildlife (PSHA)*, 157 Wn. App. 935, 938, 239 P.3d 1140 (2010); *see also,* AR 3645-51 (2012 Regulations amending WAC 220-47-311 (purse seine) and WAC 220-41-411 (gillnet)).

Commercial purse seiners and gillnetters catch fish using very different methods. Purse seiners use large boats with large and deep nets capable of catching significantly more fish per hour than gillnetters. Gillnetters, on the other hand, have more licensed, but significantly

smaller, boats and rely on much smaller nets.[1] As a result, the gillnetters have a much smaller catch per boat. In 2006-2007, for example, the entire gillnet fleet caught an average of 725 chum per hour of fishing time. The purse seiner fleet caught an average of 4,893 chum per hour of fishing during this same period. *See PSHA*, 157 Wn. App. at 939.

Commercial chum salmon fishing regulations for Puget Sound are developed by WDFW through the annual "North of Falcon" planning process. In general, this process starts with a forecast of salmon expected to return to Puget Sound. Based on this forecast, the Indian treaty tribes and WDFW agree on an appropriate allocation between treaty and non-treaty fishermen. *Id.* at 938. Then, based on this allocation and following several months of technical meetings and policy level discussions among industry, tribal co-managers, the public, and WDFW, the North of Falcon process results in the establishment of annual fishing schedules for the tribal- and state-managed salmon fisheries. *See* AR 3661-62.

Appellant PSHA represents the non-treaty gillnet fishing fleet. Historically, between 1973 and 1993 gillnets caught approximately 50 percent of the chum salmon available for the non-treaty commercial

[1] In 2011, for example, there were 195 licensed gillnet boats. Of those, 76 reported "landings" or catch of chum salmon in South Puget Sound with a total of 40,220 fish caught. During that same season there were 75 licensed purse seine vessels with 69 reporting landings of chum salmon with a total of 160,423 fish caught. AR 2973.

harvest in South Puget Sound. AR 3687; *PSHA,* 157 Wn. App. at 940. But after 1990, the gillnet fleet saw a significant decline in the total harvest, catching as little as 4 percent of the total catch in the 2002 chum fishery. *Id.* To "promote the well-being of that sector of the industry[,]" WDFW responded in 2003 by providing additional time on the water for gillnets. AR 3670. While the gillnet fleet's proportion of the total catch increased to approximately 25 percent in 2008, the harvest never recovered to reach even the low end of historical levels. AR 3687.

In response to the gillnet fleet's increasing success, however, beginning in 2007 WDFW attempted to reduce the allocation of fishing time available for gillnetters in South Puget Sound in order to reduce the gillnet fleet to a "benchmark" of 15 percent of the available harvest. WDFW's benchmark was based on averaging an arbitrary five-year period from 1996-2001. AR 1434-39 ("2003 Greensheet"). While WDFW ultimately failed to achieve its arbitrary "benchmark," the 2007 season resulted in the gillnet fleet catching approximately 30 percent of the harvest, leaving the other 70 percent to the competing commercial non-tribal purse seine fleet.

PSHA challenged WDFW's 2007 fishing schedule in Thurston County Superior Court. On June 2, 2008, the trial court ruled that there

was no rational basis for WDFW's allocation and invalidated the rules as arbitrary and capricious. The trial court concluded that WDFW was required to allocate the resource equitably and that there was no rational basis to use only the years 1996-2001 as a basis to determine an equitable allocation. The trial court also awarded PSHA its attorneys' fees. *PSHA,* 157 Wn. App. at 939. WDFW did not appeal the trial court's Order.

Shortly after the trial court's ruling on the 2007 regulations, on July 8, 2008, WDFW issued its 2008 regulations for commercial salmon fishing in Puget Sound. In its 2008 regulations WDFW decided that it would only fairly allocate "harvest *opportunity* between gear groups." In other words, WDFW decided arbitrarily to focus on an allocation of equitable time on the water as opposed to an opportunity to harvest an equitable number of fish. *PSHA,* 157 Wn. App. at 939-940. PSHA was forced once again to seek judicial review of the 2008 regulations before Thurston County Superior Court. PSHA again argued that the 2008 regulations were arbitrary and capricious for failing to equitably allocate the available harvestable fish between the two competing non-tribal commercial fishing groups. Once again the trial court agreed with PSHA and declared the 2008 regulations arbitrary and capricious and invalid. *PSHA*, 157 Wn. App. at 944.

WDFW appealed the trial court's ruling on the 2008 regulations to this Court. While this Court recognized that a precise 50-50 allocation "would simply not be feasible, given variables from season to season" and that a 50-50 allocation "made without regard to the attending facts or circumstances, would be arbitrary and capricious as well," the Court still confirmed the trial court's conclusion that there must be a rational explanation in the record to explain the disparity. This court confirmed that the 2008 regulations were arbitrary and capricious. *PSHA,* 157 Wn. App. at 950.

Despite this Court's ruling, WDFW continued to maintain an allocation by scheduling time on the water so that the gillnetters would have the opportunity to harvest less than 30 percent of the chum salmon in South Puget Sound, with the purse seiners having the opportunity to harvest approximately 70 percent. AR 2973. In recent years, the allocation has begun to decline again, dropping to 22 percent in 2009 and to a mere 20 percent in 2011. *Id.*

B. The 2012 Regulations

The North of Falcon process for the 2012 fishing rules began in January, 2012. AR 3661. Draft regulations were first proposed by WDFW on February 22, 2012. AR 2899-2913. On February 29, 2012,

WDFW presented and discussed the 2012 preseason forecast with interested stakeholders and that same day convened a meeting specific to South Puget Sound. AR 3661.

For South Puget Sound, Areas 10 and 11, WDFW proposed a schedule similar to schedules it had adopted in recent years – i.e., a schedule allowing the gillnetters the opportunity to harvest approximately 24 percent of the harvestable chum salmon. AR 3670-72. During the course of discussions, the gillnet industry made several requests for alterations to the proposed schedule, the most significant being requests to extend one of its "half-night market openings" in South Puget Sound to a full night and to allow more "first start" openings in the South Sound. AR 3675.[2] According to WDFW, it denied these requests because:

> These requests for increases in opportunity and adjustment to the recent rotation of first starts between gears each session were not supported by the department since no supporting rationale was presented and because the proposal was opposed by the purse seine industry representatives.

[2] In general, gillnetters fish during nighttime hours, between approximately 5:00 p.m. and 9:00 a.m. Mid-week half-night market nights began in approximately 2008 with the intent of allowing gillnet license holders to get fish supply to local farmers' markets before the weekend. Half-night market nights typically allow fishing between 4:00 p.m. and midnight. AR 3673.

AR 3675. While WDFW did approve another minor request proposed by the gillnet industry, it did so only after concluding that the change was "unlikely to cause a change in total catch rates of chum or bycatch across the season; ..." AR 3675. Thus, the final 2012 regulations sought to maintain the same assumed allocation as in the previous several years with the gillnetters given an opportunity to harvest approximately 24 percent of the harvestable chum salmon in South Puget Sound and the purse seiners the remaining 76 percent. The 2012 Regulations were finalized as permanent on July 12, 2012. AR 3645-58.

On August 1, 2012, PSHA petitioned Thurston County Superior Court for declaratory judgment under the Administrative Procedures Act, challenging WDFW's 2012 regulations as arbitrary and capricious. After briefing and oral argument, on February 25, 2013, superior court Judge Chris Wickham denied PSHA's petition. CP 23-27. The appeal follows.

V. ARGUMENT

A. Standard of Review

When reviewing an appeal under the Administrative Procedures Act, Ch. 34.05 RCW ("APA"), this Court stands in the shoes of the Superior Court, and reviews the agency's actions de novo. *Tapper v. State Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494, 498 (1993).

Pursuant to the APA, a court shall declare a rule invalid if it finds that the rule: (1) violates constitutional provisions; (2) exceeds the statutory authority of the agency; (3) violates rulemaking procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c). PSHA bears the burden of proof. *PSHA*, 157 Wn. App. at 945.

An agency action is arbitrary and capricious if its action is willful and unreasonable and taken without regard to the attending facts and circumstances. *Id.*; *Wash. Fed'n of State Employees v. Dep't of Gen. Admin.,* 152 Wn. App. 368, 387, 216 P.3d 1061 (2009) (quoting *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n,* 148 Wn.2d 887, 905, 64 P.3d 606 (2003)). The reviewing court must consider the relevant portions of the rule-making file and the agency's explanations for adopting the rule as part of its review. *Wash. Indep. Tel. Ass'n,* 148 Wn.2d at 906. "Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Hillis v. Dep't of Ecology,* 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Substantial weight is given to the agency's view of the law if it falls within the agency's expertise in that special field of law. *NW. Steelhead & Salmon Council of Trout Unlimited v. Dep't of Fisheries,* 78 Wn. App. 778, 786–87, 896 P.2d 1292 (1995).

Although WDFW is entitled to deference, the " 'arbitrary and capricious' standard must not be used as a 'rubber stamp' of administrative actions." *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 434 n.8, 166 P.3d 1198 (2007).

B. WDFW Management Authority and Management Objectives

Under RCW 77.04.012, the mandate of WDFW is:

> ... [to] conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource. In a manner consistent with this goal, [WDFW] shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state.

RCW 77.50.120 further states:

> It is the intent of the legislature to ensure that a sustainable level of salmon is made available for harvest for commercial fishers in the state. Maintaining consistent harvest levels has become increasingly difficult with the listing of salmonid species under the federal endangered species act. Without a stable level of harvest, fishers cannot develop niche markets that maximize the economic value of the harvest. New tools and approaches are needed by fish managers

to bring increased stability to the fishing industry.

Based on these authorities, WDFW's rationale for adopting the 2012 Regulations is described in WDFW's Concise Explanatory Statement ("CES") and based on the following management objectives, identified by WDFW in order of priority:

1. Achieve conservation objectives for all species and stocks
    a. Ensure primary stocks meet escapement goals
    b. Minimize by-catch of all non-target species
    c. Monitor fisheries to ensure a & b are met
2. Harvest non-treaty share of salmon
3. Maintain the economic well-being and stability of the fishing industry (RCW 77.04.012); allow a sustainable level of harvest sufficient to provide opportunity for each gear type (RCW 77.50.120)

AR 3662-63.

C. The 2012 Regulations for South Puget Sound are Arbitrary and Capricious

1. The 2012 Regulations maintained the gillnetters' expected harvest at 24 percent

At the outset, there should be no dispute that the opportunity to catch fish is directly proportional to the equipment used and time allowed on the water. Just as in 2007 and 2008, WDFW has information available

to estimate the approximate number of fish that that each gear type will catch in a given amount of time. *See PSHA,* 157 Wn. App. at 947-949. Thus, the ability for the gillnetters to increase their opportunity to catch fish is directly related to the amount of time they are allowed on the water. By setting a fishing schedule, WDFW indirectly controls how many fish each commercial gear group has the opportunity to harvest. WDFW, through its regulations, is allocating the share of chum salmon harvest.

There should also be no dispute that WDFW is continuing its pattern of allocating disproportionately in favor of the purse-seine fleet – by a three-to-one margin. The 2012 regulations were designed to allow the gillnet fleet to catch approximately 24 percent of the harvestable chum salmon and allow the competing purse seine fleet to catch 76 percent. But just as in 2008, WDFW has failed to provide a rational explanation for maintaining this ratio.

2. WDFW has failed to explain a rational basis to continue its disparate treatment of the gillnet fleet

In *PSHA*, this Court acknowledged that a 50-50 split may be impossible to achieve, and may itself not be rationale, but nevertheless, it was still incumbent upon WDFW to explain the rational basis for its allocation:

> We emphasize that WDFW need not be mathematically precise in fairly allocating harvest opportunity. First, a guaranteed 50–50 allocation would simply not be feasible, given variables from season to season. More importantly, however, a 50–50 allocation, made without regard to the attending facts or circumstances, would be arbitrary and capricious as well. In setting its schedule, WDFW must consider its management objectives and its mandate to "[m]aintain the economic well-being and stability of the fishing industry" in the state. ... To align itself with these objectives, WDFW should consider reasonable factors, such as the predicted number of fish, the numbers of each group, and the economics of each group. Here, WDFW claims to have considered factors such as the number of gillnetters versus the number of purse seiners, fees and taxes paid by the gear groups, direct marketing to local buyers by gillnetters, bycatch minimization, and catch proportions between 1973 and 1993; however, WDFW's consideration of these factors appears to have had little effect on the resulting schedule.
>
> WDFW must not act cursorily in considering the facts and circumstances surrounding its actions.

157 Wn. App. at 950-51.

While, as in 2008, WDFW has provided a "Concise Explanatory Statement" in support of its regulation, a careful review of the "CES" and comparison with WDFW's management objectives demonstrates that

WDFW has again only applied a cursory consideration of the facts as a method of rationalizing its continued efforts to maintain the dramatic disparate treatment of the two competing commercial gear types.

a. The 2012 regulations are based on an arbitrary analysis of non-target salmon bycatch

WDFW's management objection 1(b) seeks to "minimize by-catch of all non-target species." AR 3662. The CES acknowledges that conservation concerns include the ESA-listed Chinook and states that the majority of Chinook and coho encountered by the Puget Sound commercial purse seine fishery will survive being sorted and returned to the water, but there is a "high expected mortality rate of the fish released" by the Puget Sound gillnet fleet.[3] AR 3664 *citing* AR 424-76.[4] Also citing a lack of monitoring data to confirm the gillnet fishery's fish-ticket-based rates of capture, WDFW concludes that requiring the gillnet fishery's release of non-target salmon will not result in the minimization of bycatch mortality. AR 3664-65. On this basis, WDFW declines additional or expanded fishing opportunities for gillnet gear. *Id.*

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[3] Bycatch mortality rate refers to the percentage of catch that is dead or moribund at capture or that dies after live release due to stress from capture. AR 2851.

[4] The findings of the Chinook Technical Committee of the Pacific Salmon Commission are misrepresented by WDFW in the CES. The Chinook Technical Committee updated its 1997 publication in 2004 and it is discussed in more detail below.

WDFW's justification for distinguishing between gear types is unsupported by the record, and in some cases, the data is *contrary* to WDFW's representations. Several reports demonstrate that the majority of non-target salmon caught by the purse seine fleet do not survive release. For example, a comprehensive and independent study published by the Chinook Technical Committee ("CTC") of the Pacific Salmon Commission in 1997 – and cited misleadingly by WDFW in the CES[5] – recommends using a rate of 72 percent for total Chinook non-retention mortality for all size classes caught by purse seines. AR 469. The CTC's estimation is based on the average immediate mortality of 49 percent plus a delayed mortality rate of 23 percent. *Id.* While the mortality rate varies by fish size, the immediate and total mortality rate for small juvenile Chinook is highest: 62.8 percent for immediate mortality and 23 percent for delayed mortality, resulting in a total mortality rate for juvenile Chinook of 85.8 percent. *Id.* In 2004, the CTC reaffirmed the baseline conclusions contained in the 1997 study, but indicated that the mortality rate could be *higher* than the estimated 51 percent total mortality for large Chinook. AR 1894.

[5] WDFW does not acknowledge that, according to the CTC, by 2004, the mortality rate for Chinook from purse seines of 72 percent is significantly higher than the estimated mortality rate of 50 percent for gillnets. *See* AR 1895.

Other studies in the record support the CTC's finding that the non-retention mortality rate for non-target salmon released from purse seine fisheries is significant. A 2012 report authored by Stephen Mathews estimated the percentage of Chinook bycatch by purse seines that are either dead or die after release to be 61 percent. AR 2852. Mathews criticized WDFW's baseless downward departure from the CTC's bycatch mortality estimates from 1997 and 2004.[6] *Id.* Despite Mathews's express requests for explanation from WDFW, none was provided. *Id.* Another article, published by the North American Journal of Fisheries, utilizes a small sample of Chinook to estimate an overall mortality rate of 33 percent that rose to 50 percent if the landing time was greater than 30 minutes.[7] AR 360. However, the study acknowledged containing very little data about delayed mortality and acknowledged the possibility of "overestimating survival." AR 362.

Studies showing a lower bycatch mortality rate of non-target salmon for purse seines were prepared by Natural Resources Consultants

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[6] While Mathews challenges the baseline mortality formula employed by the CTC, his conclusions nonetheless contradict WDFW's statement that the majority of non-target salmon survive release. AR 2851-52.

[7] The North American Journal of Fisheries article is consistent with a WDFW report detailing bycatch mortality in the seine fishery from 1990 and concluding that the immediate mortality in small Chinook was approximately 32 percent. AR 109. However, the WDFW report was incomplete, candidly acknowledging that the delayed mortality rate was utterly "unknown." *Id.*

("NRC") for the Purse Seine Vessel Owners' Association ("PSVOA") and suffer from several deficiencies: they use small sample sets; they contain very little information about delayed mortality; and they predate the more recent studies referenced above by up to a decade. For instance, while NRC's 1994 observations on Hood Canal found a bycatch survival rate of 100 percent, the number of non-target salmon consisted of a mere five fish (one coho and four Chinook). AR 243-44. NRC's 1995 observations on Skagit Bay included bycatch of 64 non-target salmon and estimated a mortality rate of 25.9 percent for coho and 26.7 percent for Chinook. AR 325. However, NRC's estimates excluded non-target salmon that were missed by the crew members and discovered dead by observers. AR 325. Moreover, the study provides no estimation of delayed mortality after release. *See* AR 322-30. A 1996 NRC study in Southeast Alaska estimated a mortality rate of 1.1 percent based on a sampling of 91 Chinook, but presumed that 15 salmon with scale loss, tears near the mandible, or mouth wounds all survived. AR 416-17. The study also neglects critical information assessing delayed mortality. *Id.* For these reasons, the CTC and Stephen Mathews considered – but *dismissed* – the conclusions of the NRC suggesting comparatively low mortality rates for purse seines. *See* AR 465-69; 2851-52.

WDFW offers no analysis or even an attempted explanation of data showing that 72 percent of the non-target salmon bycatch from the purse seine fleet result in mortality. While WDFW's annual observation report from 2011 of marbled murrelets does not include bycatch *mortality* of non-target salmonids, a comparison between Table 3 and Table 4 of the report shows a bycatch discrepancy of *stunning* proportions: gillnets caught eight Chinook whereas purse seines caught more than 1,000. *See* AR 3612-13. The discrepancy in bycatch between gear types for coho is nearly twice that of Chinook. *Id.* WDFW's refusal to even acknowledge unfavorable data in the CES demonstrates how clearly and deliberately WDFW's rule fails to account for facts and circumstances, in violation of the APA. *See* RCW 34.05.570(2)(c)(4); *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 905 (agency action is arbitrary and capricious if willful and unreasoning and taken without regard to the attending facts or circumstances).

WDFW's disregard of data applicable to the purse seine fleet is compounded when the record is reviewed with reference to the gillnet fleet. Very few studies include data that comparatively analyzes

non-target salmonid mortality from *both* gear types.[8] However, where an actual comparison of data exists, the record demonstrates a lower rate of fish mortality from the gillnet fleet. For instance, the 1997 CTC study cited by WDFW in the CES estimated a 90 percent mortality rate for non-target salmon by the gillnet fishery, but WDFW does not acknowledge that the CTC updated the "generic CTC (1997) assumption of 90 percent" in 2004 to recommend using an overall mortality rate of only *50* percent for gillnets. AR 1895. The estimated bycatch mortality rate of 50 percent for gillnets is significantly *lower* than the estimated bycatch mortality rate of 72 percent for purse seines. *See* AR 469. Steven Mathews similarly concluded that the bycatch rate of Chinook from purse seines is "many times greater than gill netters" and expressed particular concern about the purse seine bycatch consisting largely of immature Chinook, which are far less likely to survive than the larger Chinook primarily caught by gillnets.[9] The record contains other studies

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[8] For instance, a WDFW report from 1991 looks only at the purse seine fishery in Hood Canal. AR 79. While the report found that only a small number of Chinook were caught, more than 3,500 coho were captured. AR 94. A WDFW report from 1994 looks only at the gillnet fishery and finds a bycatch of 47 coho and 191 Chinook, but offers no details about the number of bycatch mortalities. AR 229-38; *see also*, AR 408 (bycatch of 22 coho and 144 Chinook in Area 10/11 but no information concerning mortality). The NRC studies discussed *supra* look only at purse seine bycatch.

[9] Mathews stated the smallest Chinook in gillnet catches were 4 pounds, while the average purse seine test catches were 3.5 pounds. AR 2855. While Matthews also stated that the number of coho caught per thousand chum salmon appears to be at least

considering non-target salmon bycatch and emphasizing long-term risks of inaction by regulatory entities, but many of those studies provide little or no concrete data assessing bycatch mortality and ultimately lend little support for or against WDFW's implementation of its management objectives. *See* AR 1922-26; 2014-23; 2494-2508.

While WDFW concludes it is proper to distinguish among gear types based upon bycatch mortality, the basis for the distinction conflicts with the record. The single document cited in the CES to support WDFW's claim that gillnets have a higher mortality rate for non-target salmon than purse seines was updated in 2004 to conclude that gillnets have a significantly lower mortality rate for non-target salmon than purse seines. While some evidence also indicates purse seines have a low mortality rate among non-target salmon, these studies offer no gear-to-gear comparative analysis and are deficient in their methodologies. *See infra* at pp. 16-19.

Even more, the CES does not address or even consider how the estimated bycatch mortality rate of non-target salmon is impacted by the flagrantly higher volume of fish caught by purse seines in comparison to gillnets. According to WDFW's 2011 observer data, purse seines caught

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twice as high for purse seiners as for gillnetters, the higher catch-rate for purse seiners could be mitigated if certain restrictions on care and handling are observed. AR 2854-55.

more than 1,500 Chinook, while gillnets caught only eight. AR 3612-13. Even if it were assumed that both gear types had a similar bycatch rate, the *actual* mortality in numbers of fish caused by purse seines would still be stunning and in gross disproportion to the mortalities caused by gillnets.[10] To reach WDFW's conclusion that gillnets have a higher mortality rate than purse seines would require significant parts of the record to be simply ignored.

b. The 2012 regulations are based on an arbitrary analysis of other non-target bycatch

The CES also attempts to rationalize the disparate allocation based on concern over other non-target species, including spiny dogfish and marbled murrelets. AR 3664. Once again, however, the data does not support WDFW's concern, much less its allocation.

For example, the spiny dogfish (a species of shark) is not endangered, threatened, or even a species of concern. WDFW indicates only that it has a request from the Fish and Wildlife Commission "for an estimate of the bycatch of dogfish in the Puget Sound commercial salmon fisheries." AR 3664. But while onboard monitoring data did observe two

[10] Using WDFW's 2011 observer data, a 50 percent bycatch mortality rate applied to the bycatch for each gear type would result in an alarming disproportion of fish kills from purse seines: 750 dead Chinook, whereas gillnets would be responsible for only four.

incidences where gillnet boats caught a large number of spiny dogfish, in both instances, WDFW observers reported that *all* were released uninjured. *See* AR 3060, 3067.[11] Two incidences with no injured dogfish do not support WDFW's allocation.

The CES states that data collected from recent purse seine seasons indicates a "low encounter rate" with other wildlife species but extrapolation of purse seine data to the gillnet fishery "may not be valid given known differences between the gear types and their impacts on various species." AR 3665. This assertion is based on a 1994 U.S. Fish and Wildlife Service ("USFWS") biological opinion on the threatened marbled murrelet and a 2009 WDFW observation of two entangled porpoises. *Id.*

Contrary to WDFW's statement, the USFWS's biological opinion contains *no* data indicating that a single marbled murrelet has been harmed

[11] The onboard observation data, AR 3027-3152, is also interesting to compare the level of observation between the two competing commercial fleets. For example, at AR 3060, WDFW observer Mike Parker is onboard a gillnet vessel during the entire night in order to observe the harvest from beginning to end. The observation notes indicate all species caught, the depth of the nets, the depth of the water and location. In contrast, at AR 3055, Mr. Parker uses one sheet to record six different purse seine landings during a single night. Each of these landings are spaced roughly 20-45 minutes apart meaning in that time interval he "observed" the landing and travelled to the next boat. The data sheets also do not list details of depth or net length, but it does note, on AR 3056, that the "Margaret J" pulled up at least one non-target coho as well as crab, seastar, cucumber, sole and scallops – bottom dwelling species.

by non-tribal commercial gillnet fisheries in Areas 10 and 11.[12] The USFWS states that gillnets *could* pose the greatest risk of drowning seabirds, but found that actual entanglement is a "rare event" and estimated – in 1994 – that 13 murrelets *could* be killed during the all-citizens net fishery. AR 213-15. But based on all available data, the USFWS concluded that the commercial salmon fishery in Puget Sound "is not likely to jeopardize the continued existence of the threatened murrelet," AR 225, and "none" of the critical habitat proposed for the species would be affected by the proposed action. AR 202. Significantly, the mortality rate for gillnets and purse seines fishing a complete season in Areas 10 and 11 was estimated to be less than one marbled murrelet for each fishery: 0.5 for gillnets and 0.2 for purse seines.[13] AR 215.

In 2001, the USFWS updated the biological opinion and again reached the conclusion that the Puget Sound commercial salmon fisheries

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[12] Nor does there appear to be any other data in the record showing significant risk to murrelets from the gillnet fishery in Puget Sound, much less Areas 10 and 11. One study indicated that a murrelet was caught in a gillnet in 1993 off Lopez Island and four murrelets were caught by purse seiners, but there is no data indicating any of the murrelets were harmed by either gear type. AR 261-62. A WDFW report from 1996 included data indicating that 305 murrelets were *observed* around Hood Canal in Area 12/12B, but none were entangled. AR 407. WDFW also conceded that the estimate did not represent individual birds since the same animals could have been counted on different days. *Id.*

[13] The opinion estimated a total of 10 mortalities could be caused by the gillnet fishery and three mortalities could be caused by the purse seine fishery. AR 215. The USFWS identified the areas around the San Juan Islands and Hood Canal as having the highest concentrations of murrelets in Puget Sound. AR 216.

are not likely to jeopardize the continued existence of the marbled murrelet. AR 1423. However, utilizing additional data on murrelet distribution, the USFWS *reduced* the number of total estimated murrelet mortalities in Puget Sound by more than half, from 13 to 6. AR 1421-22. The risk to murrelets in southern Puget Sound was so low that the USFWS determined in 2001 that *no* specific conservation measures were necessary for Areas 10 and 11. *See* AR 1421 at Table 2.[14]

Other data in the record focusing on Puget Sound confirms the rarity of an actual encounter between the non-tribal commercial fisheries and marbled murrelets in Puget Sound. In 1993 WDFW observer data confirmed "no interactions with marbled murrelets in the non-treaty gillnet fisheries."[15] AR 176. A 1994 WDFW observation of 357 gillnet panel sets in Area 7 again confirmed no murrelet entanglements. *See* AR 311. Another report from 1994 following the observation of nearly 10 percent of the gillnet fleet in Areas 7/7A found that one murrelet was entangled but was released alive and unharmed. AR 390. A WDFW observation of

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[14] The low occurrence of murrelets in Areas 10 and 11 during the chum season contrasts with the high density of murrelets observed near gillnets in British Columbia. *See* AR 14-15 (estimated mortality of 380 murrelets in Barkley Sound in 1980); *see also*, AR 256-62 (discussing high mortality of murrelets in B.C. and encouraging additional study in northern Puget Sound and San Juan Islands).

[15] One murrelet mortality was apparently reported in a pre-season test fishery in Area 7. AR 176.

230 sets from the 1994 chum salmon fishery in Areas 10 and 11 and 12/12B found no entanglements with marbled murrelets. *See* AR 405.

In 2001, WDFW looked at the available data, found that no murrelets were encountered during the 1995 sockeye test fishery or in the terminal chum-directed test fishery in South Puget Sound, and stated that no marbled murrelet "entanglements were documented in any non-treaty pre-terminal or terminal commercial or recreational salmon fishery since 1993."[16] AR 1352-53. WDFW thus concluded that "all available evidence indicates that the occurrence of Marbled Murrelets in the Puget Sound sport and net fisheries in 2001 and beyond will be an extremely rare event." AR 1353. WDFW's expectations looking forward were that the actual encounter of marbled murrelets in Puget Sound "will be significantly *less* than the estimate of 15 annual encounters" from past studies. *Id.* (emphasis added). For WDFW to *now* claim that gillnets pose a risk to marbled murrelets is – again – to ignore the content of the record.

WDFW does not cite to any study or other data in the record supporting the claim that purse seines have a "low encounter rate" of other non-target species, *see* AR 3664-65, and the evidence in the record does

[16] While one murrelet was observed entangled in the pre-terminal sockeye test fishery in 1996, experimental gear was specifically being tested in areas of high seabird abundance. AR 1353.

not support distinguishing among either gear type based on the bycatch mortality of other non-target species. A 2009 study authored by Nathalie Hamel found that Puget Sound fisheries were responsible for a small fraction of the baseline mortality of other seabirds such as the common murre, adding 0.2 percent to 2.9 percent to annual mortality rates. AR 2188. The overwhelming percentage of these deaths occurred from fisheries outside of Areas 10 and 11, *see* AR 2183, and while the authors lamented *any* waste of biodiversity, they acknowledged that fisheries-associated bycatch of the common murre may have no "demonstrated impact on populations" in Puget Sound. AR 2190.

Other studies similarly show that *both* gear types have some impact on seabirds and marine mammals but fall short of providing a basis for disparate treatment. For instance, a 1995 NRC study prepared by the PSVOA estimated that approximately 47 rhinoceros auklets were killed by non-tribal seines during the sockeye season, AR 281-282, while another study found that the gillnet fleet was responsible for the mortality of 52 murres and auklets during the 1993 sockeye season. AR 179. Gillnets were responsible for the mortality of even fewer seabirds during the chum

season.[17] AR 179. A WDFW observer program from 1994 found that 23 seabirds were entangled by gillnets in the entire chum fishery, 20 of which were mortalities. AR 405. More recent data from WDFW confirms that even in 2011, the number of seabird mortalities from the gillnet *and* purse seine fishery remains low: a total of 37 seabirds – predominantly murres and auklets – were found entangled and dead. AR 3611-12. While most of the mortalities were attributed to gillnets, WDFW admitted that it did not monitor purse seines in Hood Canal. AR 3611.

Some studies found between one and five marine mammals were entangled by gillnets, but most escaped unharmed and occurred outside of Areas 10 and 11. *See* AR 313; 368; 405. The CES claims two porpoises were entangled by gillnets in 2009 and appeared to be dead, AR 3665, but another study also indicated that 22 harbor seals were encircled by purse seines and one was trapped. AR 279. The 2011 data from WDFW demonstrates that gillnets have caught numerous dogfish, but there is no indication whether any were harmed or released without injury. *See* AR 3613. Other studies are either inconclusive[18] or provide little or no

[17] Sixteen murres and auklets were killed during the chum season in Areas 10 and 11. AR 179.

[18] A 1995 study by Edward Melvin found low seabird entanglement rates from the gillnet fishery in Area 7/7A and did not provide an analysis of mortality. *See* AR 303-19.

data discussing either the gillnet or purse seine fleets in Washington waters.[19]

Critically, WDFW makes no attempt to explain data in the record by assessing the comparative effects of bycatch among gear types upon various species. For instance, there is no acknowledgment of the high bycatch mortality rate of Chinook resulting from purse seines and no analysis of those impacts in comparison to the impact of gillnets capturing – but not necessarily harming – spiny dogfish. WDFW's conclusory statement that purse seine bycatch is benign while gillnet bycatch mortalities cause "special concern" is unsubstantiated, and ignores a record which actually demonstrates the converse: purse seine bycatch of non-target species such as threatened Chinook is significant while the bycatch of other non-target species such as seabirds and marine mammals appears to be benign. WDFW's attempt to justify a different conclusion is arbitrary and capricious.

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[19] For instance, a 1981 study estimates a global mortality of 500,000 seabirds, based in part on observations of several Japanese vessels fishing in the North Pacific and Bering Sea in 1978 and 1979. AR 6-8. A 1993 report looking at coastal gillnet fisheries from Japan to Alaska reported that "[n]o data are available on the incidental take of seabirds in gill nets in Washington." AR 151. *See also*, AR 1911-12 (discussing seabird mortality in Californian, North Atlantic, Canadian, and Greenland fisheries). The focus of Andrew Read's report, "Bycatch of Marine Mammals in U.S. and Global Fisheries," is upon California, Alaska, and the Northeast Atlantic. AR 1993-95. None of the endangered species of marine mammals highlighted by Read have been identified by WDFW to occur in Puget Sound. *See* AR 1995.

c. The 2012 Regulations do not maintain the economic well-being and stability of the industry

WDFW's third management objective is to "maintain the economic well-being and stability of the fishing industry (RCW 77.04.012); [and] allow a sustainable level of harvest sufficient to provide opportunity for each gear type." AR 3663. WDFW concludes that the most effective means of positively affecting the well-being and stability of the industry is by "providing a predictable season structure designed to access the full allowable harvest." AR 3668. WDFW does not, however, cite to any authority supporting the adoption of "predictability" as the barometer by which the well-being and stability of the industry is achieved. Indeed, it appears that WDFW's idea of predictability is focused primarily on protecting the allocation and profit margin for the purse seine fleet. Indeed, one of the primary reasons given for refusing the gillnet industry's request to revise the 2012 schedule was opposition "by the purse seine industry representatives." AR 3675. But RCW 77.04.012 does not say that WDFW is required to protect the economic well-being and stability of a one portion of the industry, but the entire industry. If the gillnet fleet is allowed to increase harvest and the purse seine fleet's portion is reduced, the industry is maintained.

WDFW then acknowledges a historical average of 32 percent of the total catch for the gillnet fleet, but arbitrarily modifies the historic average catch share due to a "change in fleet composition" in years 2008-2011. AR 3672. WDFW claims that a 6 percent change reduction in the gillnet fleet could be expected to reduce the historical catch share for gillnets by 6 percent and proportionately increase the average purse seine catch share by 6 percent, arriving at "historic adjusted percentages" of 26 percent for gillnets and 74 percent for purse seines. AR 3672-74. WDFW offers no justification for why one might expect an identical correlation between the reduction in gillnet *fleet size* and increase in purse seine *catch share*. Given known differences in gear efficiency,[20] WDFW's "expectation" of a symbiotic relationship between fleet size and catch share should be supported by *some* basis. WDFW offers none. *See* AR 3672.

Inexplicably, WDFW again ratchets down the expected gillnet catch share for 2012 by concluding that the allocation of 24.4 percent is "close to the historic adjusted percentages of 26 percent." AR 3672-73. WDFW's arbitrary adoption of an "historic adjusted percentage" and

[20] In 2011, 195 licensed gillnet vessels caught 88,405 chum, while 75 purse seine licensed vessels caught 342,723. AR 3687. Thus, the gillnet fleet, with nearly three (3) times the number of licenses, caught less than one-quarter of the fish raked in by the purse seine fleet.

baseless rounding of the 2012 expected allocation to the "historic adjusted percentage" fails to maintain industry well-being and stability.

An objective look at the catch data over the past several years demonstrates that WDFW has repeatedly promulgated rules that collectively amount to a cycle of reduction of catch share, whereby each year a decrease in the total harvest allocation for gillnets is justified by an arbitrary rationale, such as a "historic adjusted percentage" of gillnet catch. The gillnet fleet caught 28 percent of the catch in 2009, 24 percent of the catch in 2010, and 21 percent of the catch in 2011. As the economics of fishing becomes increasingly difficult on gillnet license-holders, WDFW can seek to continue justifying a reduced catch share for the fleet based on "changes in fleet composition." Instead of maintaining the economic well-being and stability of the industry, WDFW is slowly extirpating the gillnet fleet.

WDFW's attempt to rationalize continuing its allocation based on historic and expected income per license also fails. WDFW explains that it predicts the gillnet fleet would catch 77,800 chum salmon in 2012, with a value of $649,000 or $3,300 per each of the 195 gillnet licenses. AR 3674. It then assumes that the purse seine fleet would catch 241,200 chum salmon, with an expected value of $2,011,000 or $26,820 for each

of its 75 licenses. But WDFW's attempt to compare this income with historic levels fails miserably. While it explains that the gillnet fleet's expected income of $3,300 per license exceeds its CPI-adjusted average value of $1,050 per license for the period from 1973-2002, it then fails entirely to compare the gillnet's three-fold increase with the purse seine fleet's almost five-fold increase over this same time period (from $5,672 per license in 1973-2002 to $26,820 per license in 2012). AR 3674. Put another way, under the WDFW's ongoing effort to ratchet down the gillnet fleet's opportunity to harvest, WDFW has promoted a dramatic increase in the value of a purse seine license over a gillnet license. WDFW's attempt to justify its allocation based on economic well-being and stability is arbitrary and capricious.

D. The 2012 Regulations Violate the Equal Protection Clause

Article I, § 12 of the Washington Constitution and the Fourteenth Amendment of the U.S. Constitution prohibit special privileges and immunities and guarantee equal protection of the application of laws to all persons within a class. *Washington Kelpers Ass'n v. State*, 81 Wn.2d 410, 502 P.2d 1170 (1970). The Fourteenth Amendment of the U.S. Constitution provides that no state may "deny to any person within its

jurisdiction the equal protection of the laws." *Jenkins v. State*, 85 Wn.2d 883, 888, 540 P.2d 1363 (1975). Those persons who are similarly situated with respect to the purpose of the law must receive like treatment. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992); *Jenkins*, 85 Wn.2d at 888. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Jenkins*, 85 Wn.2d at 888 *citing Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L.Ed. 989 (1920).

The Washington Supreme Court has already recognized the propriety of an equal protection analysis where WDFW seeks to adopt regulations that have the effect of discriminating among fishermen of the same class, such as non-treaty gillnet and purse seines. *See, Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 684, 565 P.2d 1151 (1977) (constitutional provisions stand in the way of allocating fish among competing claimants "in a manner which discriminates among fishermen of the same class") *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 948, 603 P.2d 819 (1979) (treaty and non-treaty fishermen can no longer be considered competing claimants).

Equal protection claims are analyzed under the rational relationship test, which requires a showing that the law or rule being challenged rests upon a legitimate state objective and that the law must not be wholly irrelevant to achieving that objective. *Coria*, 120 Wn.2d at 169. While a rule that does not implicate a suspect class or fundamental right is presumed to be rational, the presumption may be overcome by a clear showing that the law is arbitrary and irrational. *American Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008). "The burden is upon the party challenging the classification to show that it is 'purely arbitrary.'" *Coria*, 120 Wn.2d at 172 *citing Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990).

The purpose of WDFW's 2012 Regulations is stated in the Rule-Making Order and explained in the CES. The Order amends the rules for commercial salmon fishing in Puget Sound by incorporating "the recommendations of the North of Falcon sub-group of the Pacific Fisheries Management Council to take harvestable fish in commercial salmon fisheries in Puget Sound while protecting species of fish listed as endangered." AR 3645. The 2012 Regulations were considered with respect to management objectives identified by WDFW and the Order's

purpose, which expressly prioritize "conservation objectives for all species and stocks" including minimization of "by-catch of all non-target species[.]" AR 3662-63.

WDFW's 2012 Regulations fail to meet their purpose requiring WDFW to protect species of fish listed as endangered, such as ESA-listed Chinook, and is purely arbitrary with respect to minimizing bycatch. WDFW falsely concludes that the majority of Chinook encountered by purse seines will survive release and that there is a higher mortality rate for fish released by gillnets. AR 3664. Citing to a statement in the CTC report, WDFW claims that requiring release of Chinook and coho "will not result in the minimization of bycatch mortality[.]" *Id.* But WDFW does *not* cite the CTC report's recommendation of a 72 percent Chinook non-retention mortality rate for purse seines and then – even more critically – does not acknowledge the CTC's determination that the gillnet fleet had a mortality rate 22 percent *lower* than the purse seine mortality rate. *See* AR 1895.

The CTC's recommendations are significant not merely because WDFW cites to the CTC in its CES – albeit misleadingly – but because the CTC's recommendations are largely consistent with other data contained in the record. Stephen Mathews concluded that the purse seine

non-retention mortality was approximately 61 percent and agreed with the CTC's finding that immature Chinook were at particular risk from the purse seine fishery due to a "relatively high immediate mortality of purse seine caught immature Chinook." AR 2852. Also critical, both studies also considered – then *dismissed* – NRC studies funded by the PSVOA showing a lower bycatch mortality for purse seines, and concluded the higher mortality rates were more accurate. *See* AR 465-69, 2851-52. Even a cursory look at the observations of WDFW as recently as 2011 demonstrates the sheer magnitude in difference of Chinook caught by purse seines and Chinook caught by gillnets: more than 1,500 Chinook were caught by purse seines versus a mere eight caught by gillnets. AR 3612-13.

WDFW's 2012 Regulations have no relation to achieving the purpose outlined in the Order requiring protection of endangered species such as Chinook and achieving the management objective that minimizes bycatch of non-target species. AR 3645, 3662-63. There is no basis to justify the distinction in harvest allocation between gillnets and purse seines. *See*, *Jenkins*, 85 Wn.2d at 890 (finding no rational basis to justify distinction between counties and other governmental entities). For WDFW's 2012 Regulations to be rationally related to the purpose of the

rulemaking, the record – purportedly relied upon by WDFW – would have to be outright ignored. WDFW impermissibly favors purse seines to the exclusion of gillnets, despite a record demonstrating that the disparity is clearly contradictory to the purpose of the Order and WDFW's management objectives and that it will cause increased risks to the well-being of non-target species such as ESA-listed Chinook.

Absent a rational basis for the distinction, the proper remedy is allocating an equal harvest to both gear types in Areas 10 and 11. *See, Jenkins*, 85 Wn.2d at 890-91 (statute imposing different time limitation on commencement of actions against counties than on actions against other governmental entities is unconstitutional and stating all persons similarly situated "must be provided equal access to the courts for the redress of wrongs committed by governmental entities").

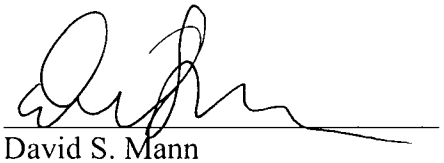
VI. CONCLUSION

For the foregoing reasons, this Court should declare that WDFW's 2012 Regulations are arbitrary and capricious. The Court should order WDFW to allocate the harvestable chum salmon equitably between the two competing commercial gear groups or provide a rational basis for failing to do so.

Dated this 19th day of April, 2013.

Respectfully submitted,

GENDLER & MANN, LLP

By: 

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\PSHA\Pleadings\COA 44567-1-II\20130419 Brief of Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

PUGET SOUND HARVESTER'S ASSOCIATION, Appellant, v. WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE, Respondent, and PURSE SEINE VESSEL OWNERS ASS'N, Respondent-Intervenor.	NO. 44567-1-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, DENISE BRANDENSTEIN, under penalty of perjury under the laws of the State of Washington, declare as follows:

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